LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
SEP 13 1952
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1952, No. 262.

CALMAR STEAMSHIP CORPORATION,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S BRIEF.

EDWIN S. MURPHY,
Counsel for Petitioner,
120 Broadway,
New York 5, N. Y.

IRA A. CAMPBELL,
HELEN C. CUNNINGHAM,
Of Counsel.

INDEX.

	PAGE
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
SPECIFICATION OF ERRORS	8
SUMMARY OF ARGUMENT	8
FIRST POINT.—THE *Portmar* WAS "EMPLOYED AS A MERCHANT VESSEL" WITHIN THE MEANING OF THOSE WORDS AS FOUND IN SECTION 2 OF THE SUITS IN ADMIRALTY ACT, 1920, 46 U. S. C. 742	12
(a) *The decisions of this Court have established two categories, public vessels, and those employed as merchant vessels*	13
(b) *The intent of Congress was that vessels carrying passengers or cargo for hire should be regarded as employed as merchant vessels*	19
SECOND POINT.—IF THE *Portmar* WAS NOT A CONSTRUCTIVE TOTAL LOSS UNDER THE WAR RISK INSURANCE POLICIES, THE GOVERNMENT IS LIABLE TO PETITIONER FOR CHARTER HIRE TO THE DATE OF REQUISITION OF TITLE TO THE VESSEL	24
(a) *The net amount of the charter hire claim*	24
(b) *Cessation of hire on constructive total loss under the war risk insurance*	25
(c) *The charter provisions for payment of hire*	27
(d) *Petitioner performed all its obligations under the charter*	29
(e) *The charter was not frustrated, even though the vessel was a constructive total loss*	31

PAGE

THIRD POINT.—IF THE WAR RISK INSURANCE WAS VITIATED OR TERMINATED BEFORE THE LOSS, OR IF PETITIONER IS LIABLE TO UNDERWRITERS FOR AN ADDITIONAL PREMIUM BY REASON OF WHAT WAS DONE BY THE *Portmar* UNDER SOVEREIGN ORDERS OF THE UNITED STATES OR ITS REPRESENTATIVES, THE UNITED STATES IS LIABLE BY VIRTUE OF ARTICLE 2.17 OF THE CHARTER TO INDEMNIFY PETITIONER AGAINST ANY AMOUNT THUS NOT RECOVERABLE FROM THE WAR RISK UNDERWRITERS OR FOR ANY SUCH ADDITIONAL PREMIUM 37

(a) *If the war risk insurance terminated before the loss* 37

(b) *If there was a deviation which entitled the war risk underwriters to additional premium* 41

FOURTH POINT.—THE UNITED STATES IS LIABLE, PURSUANT TO THE PROVISIONS OF ARTICLE 2.11 OF THE CHARTER, TO INDEMNIFY PETITIONER AGAINST ANY LOSS OR LIABILITY ARISING FROM COMPLIANCE WITH ORDERS GIVEN BY THE UNITED STATES OR ITS REPRESENTATIVES, EVEN THOUGH SUCH ORDERS WERE GIVEN AS A SOVEREIGN 43

CONCLUSION 45

APPENDIX I. 1a

APPENDIX II 3a

Table of Cases.

	PAGE
Adams, et al. v. *Mackenzie* (1863), 13 C. B. (N. S.) 442	44
Adams, et al. v. *United States,* (D. Mass. 1922) 281 Fed. 895	15, 17
American Mail Line Ltd. v. *U. S.* (1944), 101 Ct. Cl. 377	35
Assicurazioni Generali v. *Bessie Morris Co.* [1892], 2 Q. B. 652	25
Banck v. *Bromley & Son* (K. B. Div. 1920), 37 T. L. R. 71	32
Bank Line, Ltd. v. *Arthur Capel & Co.* [1919], A. C. 435	32, 36
Borup v. *Western Operating Corporation* (2 Cir. 1942), 130 F. 2d 381, 386	32
Bradey v. *United States,* (2 Cir. 1945) 151 F. 2d 74, Cert. Den. 326 U. S. 795	13
Calderon v. *Atlas S. S. Co.* (1898) 170 U. S. 272	44
Calmar Steamship Corporation v. *Sydney Keith Scott, et al.,* October Term 1952, No. 303	2
Claveresk, The (2 Cir. 1920), 264 Fed. 276, 282-283	32
Court Line, Ltd. v. *Rex,* (1943), 2 All. E. R. 357 at 362, 365	29
Eastern Transportation Company v. *United States, et al.,* (1927) 272 U. S. 675	9, 14, 15, 16
F. A. Tamplin S. S. Co. Ltd. v. *Anglo-Mexican Petroleum Products Co. Ltd.,* [1916] 2 A. C. 397	32
Froemming Bros, Inc. v. *United States* (1947), 108 Ct. Cl. 193	10, 11, 12, 38, 39, 44
Horowitz v. *United States* (1925), 267 U. S. 458	10, 12, 38, 39, 40, 41, 44
Houston Construction Company v. *U. S.* (1903), 38 Ct. Cl. 724	40
James Shewan & Sons, Inc. v. *United States* (1924), 266 U. S. 108	9, 14, 15
Jeannette Skinner, The (DMd. 1919) 258 Fed. 768	15, 17
Johnson v. *U. S. Shipping Board Emergency Fleet Corporation, et al,* (1930) 280 U. S. 320, 326-327	14

	PAGE
Kimball v. *U. S.* (1869), 5 Ct. Cl. 252	35
Knight v. *Faith* [1850], 15 Q. B. 649	29
Lake Monroe, The (1919), 250 U. S. 246	15, 16, 19
Larrinaga S. S. Co. Ltd. v. *King* [1945], A. C. 246	43
Larrinaga & Co. Ltd. v. *Societe Franco-Americaine, etc.* (H. L. 1923), 39 T. L. R. 316, 320	32
Manchester Ship Canal Co. v. *Horlock* [1914], 2 Ch. 199	26
Matson Navigation Co. v. *United States* (1932), 284 U. S. 352	3, 24
Norman Bridge, The (SDNY 1922) 290 Fed. 575	13
Nishmaha, The (D. Ore. 1920) 263 Fed. 959	14, 23
Olavarria & Co v. *United States,* (SDAla. 1944) 56 F. Supp. 758, 763	17
Rickards v. *Forestal etc. Co., Ltd.,* [1942] A. C. 50	42, 44
Roura and Forgas v. *Townend* [1919], 1 K. B. 189	26
Robertson v. *Petros Nomikos Ltd.* [1939], A. C. 371	26
State of Maine v. *United States,* (1 Cir. 1943) 134 F. 2d 574	17
Sunswick Corp. v. *United States* (1948), 109 Ct. Cl. 772	11, 40, 44
Talbot v. *U. S.* (1871), 7 Ct. Cl. 417	41
Texas Co. v. *Hogarth Shipping Co.,* (1921) 256 U. S. 619, 630	32
The Clyde Commercial Co. v. *West India S. S. Co.* (*The Santona*) (2 Cir. 1909), 169 Fed. 275	28
United States v. *Bostwick* (1876), 94 U. S. 53, 69	11, 40
United States v. *City of New York,* (SDNY 1923) 2d 250	13
United States v. *Caffey,* (2 Cir. 1944) 141 F. 2d. 69	17
United States v. *Peck* (and cross-action) (1880), 102 U. S. 64	11, 40
United States v. *Russell* (1871), 13 Wall. (U. S.) 623, 627	35

PAGE

United States Shipping Board Emergency Fleet Corporation v. *Rosenberg Brothers & Company*, (1928) 276 U. S. 202, 214 14

U. S. Grain Corporation v. *Phillips*, (1923) 261 U. S. 106 ..... 13, 15

Western Maid, The (1922) 257 U. S. 419 15

STATUTES.

Suits in Admiralty Act, 1920, 46 U. S. C. 741 and 742 ..... 2, 3, 8, 9, 12, 14, 24

Public Vessels Act, 1925, 46 U. S. C. 781, 782 ..... 14, 18

Shipping Act of 1916, Section 9 ..... 16, 19, 20, 23

British Marine Insurance Act, Sections 60 and 61 29

Merchant Marine Act of 1936, Section 912 31

MISCELLANEOUS.

Senate Report No. 223, 66th Congress, 1st Session 20

House Committee on the Judiciary, 66th Congress, 1st Session, November 13, 1919 20

Cong. Rec. Vol. 59, Part 2, pp. 1680, 1751 ..... 21, 23

Arnould on Marine Insurance, V. 2, Section 1091-(a) 29

Supreme Court of the United States

OCTOBER TERM, 1952, No. 262

CALMAR STEAMSHIP CORPORATION,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S BRIEF.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Second Circuit is reported in 197 F. 2d 795 and appears at pages 802-804 of the record.

The decision of the United States District Court for the Southern District of New York is reported in 103 F. Supp. 243, and appears at pages 700-756 of the record.

JURISDICTION.

This Court issued writ of certiorari on October 20, 1952.

The jurisdiction of this Court rests upon the provisions of Title 28, United States Code, Section 1254.

Questions Presented*

1. Whether the United States District Court for the Southern District of New York has jurisdiction under Sections 1 and 2 of the Suits in Admiralty Act, 1920, 46 U. S. C. 741 and 742, in a suit against the United States on a claim arising from the operation for the United States, under a time charter for the carriage of "lawful merchandise" for hire, of a privately owned, manned and operated

---

* In the petition for writ of certiorari herein, petitioner reserved for submission to this Court certain questions on which the Court of Appeals did not make any decision, because the libel was dismissed for lack of jurisdiction. (R. 779-781).

Said reserved questions are as follows:

(a) Whether the respondent is liable to petitioner for charter hire from February 19, 1942 to noon, Australia time, November 17, 1942, the date on which the respondent requisitioned title to the *Portmar*;

(b) Whether the respondent is liable to indemnify petitioner pursuant to Article 2.17 of said charter (see Appendix II) against any loss not recoverable from the war risk underwriters by reason of (1) vitiation or termination of the war risk insurance before the loss or (2) additional premium allowed to the war risk underwriters.

(c) Whether the respondent is liable to indemnify petitioner pursuant to Article 2.11 of said charter, (see Appendix II) against any liability or loss arising from compliance with orders given by the respondent or its representative even though such orders were given as a sovereign.

Question (a) is discussed in the Second Point hereof.

Question (b) is discussed in the Third Point hereof.

Question (c) is discussed in the Fourth Point hereof.

If this Court reinstates the decision and decree of the District Court (R. 700-756, 765-768) in *Calmar Steamship Corporation* v. *Sydney Keith Scott, et al.*, October Term 1952, No. 303, then it will not be necessary for this Court to deal with the above reserved questions (a) and (b), because in (a) no further charter hire would then be recoverable by petitioner; and in (b) there would be no basis for indemnity. In (c), however, the indemnity is recoverable, regardless of the insurance, and for the benefit of subrogated underwriters.

American cargo vessel, carrying military equipment and supplies shipped as "lawful merchandise" by the United States under said charter.

2. Whether a privately owned, manned and operated American cargo vessel, operated for the United States under a time charter for the carriage of "lawful merchandise" for hire, is deprived of her character as a merchant vessel, so as not to be "employed as a merchant vessel" within the meaning of those words as found in Section 2 of the Suits in Admiralty Act, 1920, 46 U. S. C. 742, because the Government elects to ship on said vessel military equipment and supplies as "lawful merchandise" under said charter.

Statement of the Case

This is a suit against the United States under Sections 1 and 2 of the Suits in Admiralty Act, March 9, 1920 (41 Stat. 525) 46 U. S. C. 741 and 742, set forth in Appendix I.

The libel herein was filed in the United States District Court for the Southern District of New York in accordance with the ruling of this Court in *Matson Navigation Co.* v. *United States*, (1932) 284 U. S. 352.

The causes of action are founded on the time charter of SS. *Portmar* between petitioner, owner, and the United States Maritime Commission, charterer, dated as of November 21, 1941, and relate to damage sustained by the *Portmar* by enemy aerial attack in the Timor Sea on February 16, 1942, and at Port Darwin, Australia on February 19, 1942.

The Vessel.

The *Portmar* was an American cargo vessel classed in Lloyd's Register of Shipping. The *Portmar* was a general

cargo carrier and had never been used as anything else since petitioner acquired the vessel in 1930. Libelant's Exhibit 1, R. 580; R. 160.

The *Portmar* was owned, operated, manned and supplied by petitioner, and was navigated by merchant officers and seamen hired and paid by petitioner. R. 128, 133, 154. *Charter,* Art. 2.01 and 2.05 (see Appendix II), R. 22, 25.

The Charter.

As of November 21, 1941 petitioner chartered the *Portmar* to the United States Maritime Commission by a time charter for one round voyage to the Philippine Islands and return. Said charter contained, among others, the provisions set forth in Appendix II.

The Voyage.

Pursuant to Article 1.01 of said charter, the *Portmar* sailed on November 28, 1941 from San Francisco for the Philippine Islands, with cargo of high octane gasoline in drums, military equipment and supplies shipped by the Government as "lawful merchandise", under Article 2.01 of said charter.

After the Japanese attack on Pearl Harbor December 7, 1941, the *Portmar* was diverted by United States Naval orders to Suva in the Fiji Islands, there to take orders from the British Naval Authorities. The British naval authority at Suva ordered the *Portmar* to Sydney, Australia, there to report to the Australian Naval Control. After arrival at Sydney the *Portmar* moved, always under sovereign military orders, between various ports on the eastern and northern coasts of Australia.

While so engaged, the *Portmar* sustained slight damage by Japanese aerial attack on February 16, 1942 in the

Timor Sea; and on February 19, 1942 at Port Darwin, Australia she was so heavily damaged by Japanese aerial attack that the Master was obliged to beach her to prevent her from sinking in the deep water of the harbor.

The United States military authorities in Australia, with the cooperation of the Australian government, later arranged for salvage and towage of the vessel to Brisbane, Australia.

The United States requisitioned title to the vessel in damaged condition on November 17, 1942 at Brisbane, Australia. R. 624-625, 738. The *Portmar* was never restored to her former condition but was patched up and used for military purposes. R. 738-739. She was later sunk by a Japanese torpedo. R. 739.

The Proceedings Below.

The libel herein states the following causes of action against the United States, R. 5-18:

1. Charter hire pursuant to Articles 1.02 and 2.04 of said charter, R. 19-20, 23-25, from date of the disaster, February 19, 1942 to date of the requisition of title, November 17, 1942.

2. Indemnity pursuant to Article 2.17 of said charter, R. 35, as to any amount not recoverable from the war risk underwriters of the *Portmar* by reason of termination or vitiation of the war risk insurance of the vessel or any additional premium allowed to said underwriters.

3. Indemnity pursuant to Article 2.11 of said charter, R. 28-29, as to any liability or loss arising from compliance with orders or directions of the United States or its agents given pursuant to Article 2.11 of said charter or any article of said charter.

Except insofar as this suit is for the benefit of the subrogated war risk underwriters, it is alternative to the action instituted by petitioner against the war risk underwriters of the *Portmar* in the United States District Court for the Southern District of New York entitled *Calmar Steamship Corporation, Libelant,* v. *Sydney Keith Scott, et al., Respondents,* now pending in this court, October Term 1952, No. 303. That suit claimed recovery for a constructive total loss in the full amount of the insurance, $860,000.00, and in addition for sue and labor charges and salvage award paid, with interest, and in the alternative for a partial loss.

The Decisions Below.

The District Court held that the Court had jurisdiction over all claims arising out of the charter of the *Portmar* under Sections 1 and 2 of the Suits in Admiralty Act, March 9, 1920, 46 U. S. C. 741 and 742; that the *Portmar* was operated "for the United States"; that the *Portmar* was not owned by the United States; that the charter provided that the vessel should be operated by the owner and not by the charterer; that the charter was not a demise of the vessel; that the *Portmar* was employed as a merchant vessel, being privately owned and operated for the profit of the owner, in charge of a Master and crew selected by the owner and responsible to it alone; and that the nature of the cargo did not change the merchant character of the vessel. R. 742-744.

The District Court further held herein that the intent of the charter was that the United States was not to be liable for any loss covered by the war risk insurance provided for in the charter; that the *Portmar* did not sustain any loss or damage from any cause which would render

the United States liable therefor under the charter; and accordingly, because of recovery allowed to petitioner against the war risk underwriters, disallowed the libel herein except as to petitioner's claim in the case of victualling supercargoes pursuant to Article 1.02 of said charter in the sum of $238.50 for which recovery was allowed (R. 744, 756).

The District Court allowed full recovery to the petitioner in the action against the war risk underwriters *Decree,* R. 765-768, and the war risk underwriters appealed.

The United States appealed herein on the point of jurisdiction, R. 782-784. Petitioner also appealed (R. 778) but its assignments of error were only provisional (R. 779-781) in order to protect its position in the event that the decision of the District Court in the action against the war risk underwriters should not be in all respects affirmed.

In the present case the United States Court of Appeals held, as did the District Court, that the *Portmar* was operated "for the United States" as provided by Section 1 of the Suits in Admiralty Act, 1920, (R. 742, 803) but reversed the decision below, holding that the District Court had not any jurisdiction of the causes of action alleged in the libel because the *Portmar* was not "employed as a merchant vessel" within the meaning of those words as found in Section 2 of the Suits in Admiralty Act, 1920, 46 U. S. C. 742, by reason of the nature of the cargo shipped at San Francisco under the charter.

In the action against the war risk underwriters the United States Court of Appeals reversed the decision below and directed that the libel be dismissed, holding that the war risk insurance had terminated before the loss occurred. R. 792-802.

Thus Petitioner was deprived of recovery against the war risk underwriters and was also denied on jurisdictional

grounds any alternative recovery in the District Court against the United States in the present suit.*

Specification of Errors

1: The United States Court of Appeals erred—

1. In holding that the *Portmar*, privately owned, privately manned and operated, was not employed as a merchant vessel during the period here involved, because she carried a cargo of Government munitions and war material.

2. In holding that the District Court did not have jurisdiction of the libel herein under Sections 1 and 2 of the Suits in Admiralty Act, 1920.

Summary of Argument

1. *The Portmar was "employed as a merchant vessel" within the meaning of those words as used in Section 2 of the Suits in Admiralty Act, 1920.*

Prior decisions of this Court have established two categories for all vessels in the service of the United States, (1) public vessels and (2) vessels employed as merchant vessels.

In the first class lie all vessels owned by the United States legally or *pro hac vice*, and manned and operated by the United States, not carrying cargoes or passengers for hire.

In the second class lie all vessels, even though owned and operated by the United States, engaged in the business of carrying cargo or passengers for hire.

---

* On January 15, 1948 petitioner instituted suit now pending against the United States in the Court of Claims, No. 48509. The first three causes of action of the petition in that suit parallel those alleged in the libel in the present case, because the Government's answer herein raised the issue of jurisdiction. R. 18, 44.

James Shewan & Sons, Inc. v. *United States* (1924), 266 U. S. 108;
Eastern Transportation Company v. *United States, et al.* (1927), 272 U. S. 675.

The intent of Congress was that the term "employed as a merchant vessel" as used in Section 2 of the Suits in Admiralty Act, 1920 would embrace all vessels except public vessels owned and operated by the United States, and that the distinction between a public vessel and a vessel employed as a merchant vessel, is the fact of carriage of persons or property for hire.

There is no indication of Congressional intent that a cargo vessel usually employed in the carriage of cargo for hire would lose her character as a merchant vessel if she should engage in the carriage of *government* cargo or personnel for hire. The merchant character of such a vessel is fixed by her employment in the earning of money for owner by the carriage of persons or cargo for hire, not by the nature of her passengers or cargo.

In the event that the vessel may carry a split cargo, part government property and part general commercial cargo, what would be the basis for determination of jurisdiction? It is obvious that the test adopted by the Court below as to the nature of the cargo would not serve in many cases and is, therefore, unsound because the test of jurisdiction should be definite and clear.

Accordingly, the test of jurisdiction of this case under Section 2 of the Suits in Admiralty Act, 1920 is whether at the material time the *Portmar*, privately owned and operated was engaged in the carriage of passengers or cargo for hire; not the kind of passengers or cargo which the vessel may have carried.

2. Petitioner is entitled to recover charter hire from the United States, if it should be held that the Portmar *was not a total loss, either actual or constructive, under the terms of the war risk insurance.*

The term "constructive total loss" as used in Article 2.03 of the charter means a constructive total loss under the war risk insurance policies which are specified in, and the form of which was prescribed, by Article 2.17 of the charter. The charter provides for continuance of the payment of charter hire if the vessel be out of service by reason of damage sustained due to enemy attack, unless the vessel shall be an actual total loss, or a constructive total loss within the provisions of the war risk insurance.

Petitioner performed all of its obligations under the charter. The *Portmar* sustained extensive damages by enemy attack on February 19, 1942. Petitioner was relieved from any liability for non-performance by the provisions of Article 2.16 of the charter. The *Portmar* was never physically abandoned by petitioner. Tender of abandonment to the underwriters for a constructive total loss is not physical abandonment of the vessel.

There was not any frustration of the *charter* of the *Portmar*, even though the voyage came to an end by constructive total loss of the vessel.

3. If the war risk insurance was terminated before the loss by reason of compliance by the Portmar *with orders issued by the United States as sovereign, then under the provisions of the last paragraph of Article 2.17 of the charter the United States is bound to indemnify petitioner to the extent of any loss which would otherwise have been covered by the war risk insurance.*

The rule stated by this Court in *Horowitz* v. *United States* (1925), 267 U. S. 458 and in *Froemming Bros., Inc.*

v. *United States* (1947), 108 Ct. Cl. 193 is limited to a situation in which the sovereign issued general orders affecting all persons, property or vessels.

Here the sovereign act was specific as to the *Portmar* alone and was therefore a breach of the express undertaking of the last paragraph of Article 2.17 of the charter. Under such circumstances the Government is as liable for breach of contract as any private citizen would be. *United States* v. *Bostwick* (1876), 94 U. S. 53, 69; *United States* v. *Peck* (and cross-action) (1880), 102 U. S. 64; see also *Sunswick Corp.* v. *United States* (1948), 109 Ct. Cl. 772.

The obligation of the United States to indemnify petitioner pursuant to the last paragraph of 2.17 of the charter extends to indemnity as to any amount allowed to the underwriters as an additional premium by way of set-off or otherwise under the Held Covered Clause.

4. The United States is liable pursuant to Article 2.11 of the charter to indemnify petitioner against any loss or liability arising from compliance with orders given by the United States either as charterer or as sovereign.

The last paragraph of Article 2.11 of the charter specifically provided for indemnity against the consequence of compliance with any orders or directions of the charterer "given pursuant to this Article or any other Article of this charter". Therefore the charter expressly provided for indemnity of petitioner from all consequences of compliance with any orders or directions of the United States either in its capacity of charterer or in its capacity of sovereign, the latter being explicitly provided for in Article 2.27.

Such indemnity is enforceable in favor of petitioner because even though the orders were given as sovereign,

they were specific military orders affecting the *Portmar* alone, not general orders affecting all parties or vessels similiarly situated and thus not within the rule of the *Horowitz* and *Froëmming* cases, *supra*.

FIRST POINT.

THE *Portmar* WAS "EMPLOYED AS A MERCHANT VESSEL" WITHIN THE MEANING OF THOSE WORDS AS FOUND IN SECTION 2 OF THE SUITS IN ADMIRALTY ACT, 1920, 46 U. S. C. 742.

The pertinent provisions of Sections 1 and 2 of the Suits in Admiralty Act, Appendix I, are as follows:

Section 1:

> "* * * no vessel * * * operated * * * for the United States * * * shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions * * *".

Section 2:

> "* * * in cases where if such vessel were privately owned or operated * * * a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States * * * provided that such vessel is employed as a merchant vessel * * *".

The Court of Appeals below held that the *Portmar* was operated "for the United States", R. 803, but further held that the *Portmar* was not "employed as a merchant vessel" within the meaning of those words as found in Section 2

of the Suits in Admiralty Act, 1920, and that the District Court had not jurisdiction of the libel herein because the vessel loaded at San Francisco, and carried on the voyage, military equipment and supplies. R. 802-803.

But the Court below failed to take account of the fact that said military equipment and supplies were loaded pursuant to a charter for the carriage of a full cargo of "lawful merchandise" for hire. *Charter*, Articles 1.02, 2.01, 2.03, R. 19-20, 22-23 (*post*, Appendix II).

(a) *The decisions of this Court have established two categories, public vessels, and those employed as merchant vessels.*

The cases cited as authority by the Court of Appeals below (R. 803) (*U. S. Grain Corporation* v. *Phillips*, (1923) 261 U. S. 106; *Bradey* v. *United States*, (2 Cir. 1945) 151 F. 2d 742, Cert. Den. 326 U. S. 795; *United States* v. *City of New York*, (SDNY 1923) 8 F. 2d 270; *The Norman Bridge*, (SDNY 1922) 290 Fed. 575) did not involve "the same point" as stated by the Court, but were on entirely different facts. The vessels in all those cases were either owned outright by the United States, or as to which the United States was owner *pro hac vice* by demise charter. It does not appear that any of those cases involved the carriage of passengers or cargo for hire.

So far as we are aware there is no appellate decision, prior to the decision below, holding that a privately owned, privately manned and privately operated vessel is not "employed as a merchant vessel" because she carries military equipment and supplies as "lawful merchandise" for hire. There is, however, a District Court decision which has construed the similar words of Section 9 of the Shipping Act 1916 "employed solely as a merchant vessel", on facts similar to those here involved. In that case it was

held that carriage of Government goods does not deprive the vessel of her merchant character. *The Nishmaha* (D. Ore. 1920) 263 Fed. 959.

The decision below, excluding the present case from the jurisdiction of the District Court under the Suits in Admiralty Act, 1920, is demonstrably unsound under the authorities.

It is clear from the decisions of this Court and the provisions of the Public Vessels Act, 1925, (Appendix I) that the broad plan which underlies the Suits in Admiralty Act, 1920 and the Public Vessels Act, 1925, 46 U. S. C. 781, 782, is to confer jurisdiction on the District Courts over maritime causes of action against the United States as to public or merchant vessels operated by or for the United States.

James Shewan & Sons, Inc. v. *United States,* (1924) 266 U. S. 108;

Eastern Transportation Company v. *United States et al,* (1927) 272 U. S. 675;

United States Shipping Board Emergency Fleet Corporation v. *Rosenberg Brothers & Company,* (1928) 276 U. S. 202, 214;

Johnson v. *U. S. Shipping Board Emergency Fleet Corporation, et al,* (1930) 280 U. S. 320, 326-327.

In the Suits in Admiralty Act, jurisdiction is conferred as to all maritime causes of action. In the Public Vessels Act, jurisdiction is conferred as to damage caused by a public vessel, and for compensation for towage and salvage rendered to a public vessel.

The decisions show that for purposes of jurisdiction under the Suits in Admiralty Act 1920, and the Public Ves-

sels Act, 1925, all vessels are divided into two classes (1) public vessels and (2) vessels employed as merchant vessels.

In the first class lie all vessels owned by the United States legally or *pro hac vice,* manned and operated by the United States, not carrying cargoes or passengers for hire. In the second class lie all vessels engaged in the business of carriage of cargo or passengers for hire, even though owned and operated by the United States.*

In *James Shewan & Sons, Inc.* v. *United States,* (1924) 266 U. S. 108, the question was as to jurisdiction under the Suits in Admiralty Act in a case involving a vessel which was owned by the United States but which had last been employed in the merchant service. At the time the libel was filed, the vessel was in the laid-up fleet of the Shipping Board, carrying neither crew or cargo. The District Court dismissed the libel for lack of jurisdiction on the ground that the vessel at the time the libel was filed was not "employed as a merchant vessel". This Court, on direct appeal, reversed the decree, holding that the words "provided that such vessel is employed as a merchant vessel" as found in Section 2 of the Act, "may reasonably and more liberally be interpreted as a limitation that the vessel is a merchant vessel and shall not have lost its character as

---

*Vessels owned by the United States, either outright or as owner *pro hac vice* under demise charter, and operated for Government account carrying Government munitions or goods, not for compensation by payment of freight or hire, are public vessels. *The Western Maid,* (1922) 257 U. S. 419; *U. S. Grain Corporation* v. *Phillips,* 1923) 261 U. S. 106.

Vessels even though owned by the United States which are engaged in the carriage of goods for hire or which last have been, or are next to be, in that service, are "employed as merchant vessels". *The Lake Monroe,* (1919) 250 U. S. 246; *James Shewan & Son, Inc.* v. *United States,* (1924) 266 U. S. 108; *Eastern Transportation Company* v. *United States, et al.,* (1927) 272 U. S. 675; *Adams, et al.* v. *United States,* (D. Mass. 1922) 281 Fed. 895; *The Jeannette Skinner,* (DMd. 1919) 258 Fed. 768.

such. Thus construed, § 2 gives the District Court jurisdiction in such a case as this.'"*

Thus the test is as to the *character* of the vessel as between two categories, that of public vessels and that of vessels employed as merchant vessels.

Later, in *Eastern Transportation Company* v. *United States et al.* (1927), 272 U. S. 675, this Court held that the

---

* In reaching that conclusion and in discussing the terms of Section 9 of the Shipping Act, 1916 (to which the Court of Appeals herein also referred), this Court said, 266 U. S., at pages 111-113 (italics ours):

> "We do not find anything in the Act of 1916 which would prevent its liberal construction to enable one who had repaired a vessel engaged solely as a merchant vessel for the United States from proceeding against that vessel *in rem* under the Act of 1916, even though, after the repairs had been made upon her as a commercial vessel, she was subsequently laid up, if she had not then acquired character as a public vessel. So we do not think that the decision in *The Lake Monroe*, 250 U. S. 246, would have been different had she thus been laid up after she had injured the libelant's vessel in that case. Obviously, under the Act of 1916, liability to suit of a vessel owned or controlled by the United States as a merchant vessel depended primarily, not upon the time when the suit was to be brought and the vessel was to be seized, *but upon her character as one solely engaged in merchant service* when the transaction occurred out of which the liability grew. * * * The date of the suit would be important only in the application of a statute of limitation or a *change in character of the vessel from that of a merchant vessel to public vessel*, * * * *The important line between immunity from judicial seizure of government vessels under the Act of 1916 was between public vessels and those engaged in merchant service. The mere laying up of a vessel engaged in the latter service would not change its character,* unless the Government did something affirmative to make it a public vessel. * * * In view of the relation of the Act of 1920 to the Act of 1916, unless the words of the proviso of § 2 of the Act of 1920 make any other construction unreasonable, the mere laying up of the vessel before suit brought under the act should not prevent a libel *in personam* against the United States for a claim which under the Act of 1916 might be enforced against the vessel itself. *The words of the proviso may reasonably and more liberally be interpreted as a limitation that the vessel is a merchant vessel and shall not have lost its character as such.* * * *"

Suits in Admiralty Act conferred a right of action against the United States in admiralty for damage to a barge and her cargo by collision with a sunken Government vessel which before her loss was last owned and used by the United States solely as a merchant vessel. The Government contended that the vessel which caused the damage was a wreck and was not at the time employed as a merchant vessel; thus that the District Court had not any jurisdiction under the Act. The District Court had dismissed the libel for lack of jurisdiction. On direct appeal to this Court the decree was reversed. In holding that the Suits in Admiralty Act, 1920 conferred jurisdiction under the circumstances above stated, this Court said at 272 U. S. at page 692 (italics ours):

> "* * * What the statute means by saying 'employed as a merchant vessel,' is that the vessel shall *belong to that class as distinguished from one employed in the governmental service*—not necessarily that it shall be actively thus employed at the time of the collision. *Shewan & Sons* v. *United States*, supra. * * *"

Thus this Court stated the two categories, merchant vessels and public vessels.

This division of the types of vessels into two classes was followed in *United States* v. *Caffey*, (2 Cir. 1944) 141 F. 2d. 69; *State of Maine* v. *United States*, (1 Cir. 1943) 134 F. 2d 574; *Olavarria & Co.* v. *United States*, (SDAla. 1944) 56 F. Supp. 758, 763; *The Jeannette Skinner*, (DMd. 1919) 258 Fed. 768; *Adams et al.* v. *United States* (DMass. 1922) 281 Fed. 895.

The fallacy of the test of jurisdiction under the Suits in Admiralty Act, 1920, adopted by the Court below, viz. the nature of the cargo, R. 802-803, is apparent when it is

noted that a vessel may carry a split cargo, partly government munitions or property, and partly general commercial cargo. If the test of jurisdiction under the Suits in Admiralty Act, 1920, is as to the nature of the cargo carried, the difficulty of determining whether or not the District Court has jurisdiction is apparent. Would it be based on percentage? Or on which cargo was shipped first? The standard applied by the Court below may frequently prove utterly unworkable and the uncertainties of jurisdiction will only be multiplied. For that practical reason, this Court should reject the test of the nature of the cargo applied by the Court below, and should hold that the criterion of jurisdiction under the Suits in Admiralty Act, 1920, lies in the *character of the vessel,* rather than the nature of her passengers or cargo.

The Government argued before the Court of Appeals below that the *Portmar* could not be classified as a public vessel of the United States, and that even though she were, the suit could not be maintained under the Public Vessels Act, 1925, 46 USC. 781 because that Act confers only a remedy "for damages caused by a public vessel * * * and for compensation for towage and salvage services * * *" rendered to a public vessel. Thus the Government contended that the *Portmar* was neither a public vessel, nor employed as a merchant vessel. We argued that under the decisions there is no middle ground. The Court of Appeals however, failing to appreciate that the two categories above mentioned exhaust the field, made the following statement in the course of the decision, R. 803:

> "We cannot understand what is the significance of the fact that the '*Portmar*' was not a 'public vessel' and that no suit would lie under the 'Public Vessels Act,' * * * unless the argument be that, if

there be no relief under either the Suits in Admiralty Act or the Public Vessels Act, we should assume that a suit will lie for the *casus omissus.* * * *"

No such argument was made by us. The *Portmar* was obviously not a public vessel, because she was neither owned nor operated by the United States. The Court below did not appreciate that the exclusion of the *Portmar* from the category of public vessels necessarily put her in the category of vessels employed as merchant vessels. The decisions already cited do not allow any theory that there is a twilight zone between the two, and that as to such unclassified vessels, operated "for the United States," Congress has provided no jurisdiction in the District Court for suits against the United States on maritime causes of action.

(b) *The intent of Congress was that vessels carrying passengers or cargo for hire should be regarded as employed as merchant vessels.*

The genesis of the Suits in Admiralty Act was the ruling of this Court in *The Lake Monroe* (1919), 250 U. S. 246 under Section 9 of the Shipping Act 1916, which related to vessels "employed solely as merchant vessels".

The report from the Committee on Commerce, to accompany S. 3076, the Senate bill which as amended was later enacted as the Suits in Admiralty Act, 1920, refers to the decision in *The Lake Monroe* and points out that this Court held in that case that if a vessel owned by the United States carries cargo under a charter or other agreement for a stipulated rate of freight or hire, her service is purely commercial, and that such a vessel, even though Government owned, is subject to arrest under process *in rem*, and

the ordinary liability of a merchant vessel, by reason of the terms of Section 9 of the Shipping Act of 1916. Senate report No. 223, 66th Congress, 1st Session, concludes with the following:

> "The result of this is to subject the United States to unnecessary expense and its vessels to great delays. This bill meets the situation by providing specifically for suits *in personam* against the United States and expressly prohibits suits *in rem* against its merchant vessels."

The deliberations which preceded the passage of the Suits in Admiralty Act, 1920, contained unmistakable indications that the intent was to confer immunity from arrest on, and jurisdiction on the District Courts as to, all vessels operated for the United States, which are not public vessels. The meaning of the words "employed as a merchant vessel" as laid down in the decisions in this Court, already discussed, was exactly in line with the intent of Congress in the passage of the Act.

During the hearings before the House Committee on the Judiciary, 66th Congress, 1st Session, November 13, 1919 at page 45, Charles F. Dutch, Admiralty Counsel to the Shipping Board, said that the bill (S. 3076) "* * * is confined to actions where the vessel was under an actual commitment for the carriage of goods or passengers for hire."

On January 17, 1920, on the floor of the House, Representative Andrew J. Volstead, Chairman of the House Committee on the Judiciary, when the House had S. 3076 under consideration, stated the purposes of the proposed measure in colloquy with Representative Walsh of Massachusetts

and Representative White of Maine as quoted in the footnote.*

Later, on January 19, 1920, a discussion between Representative Bankhead of Alabama and Representative Walsh of Massachusetts occurred on the floor of the House as quoted in the footnote.**

---

* Congressional Record, Vol. 59, Part 2, page 1680 (italics ours):

"Mr. Walsh. The bill as reported by the committee restricts this right to sue for damages resulting from collision or otherwise to damages received as the result of the operation of merchant ships by the United States Government. It does not include vessels of war or other vessels owned by different departments of the Government.

Mr. Volstead. *No; it simply covers merchant vessels. The committee had extensive hearings, because a great many parties insisted that we ought to extend it so as to embrace naval vessels, so called, and other vessels of the Government not engaged in commerce.* Of course, we have a very large number of those vessels. My understanding is that perhaps some effort will be made upon the floor to include those, but we will try to cross that bridge when we reach it. The Committee on the Judiciary concluded *that it ought not in this bill include anything but merchant ships.* This is in the nature of an emergency measure. I believe that if we are to consider the other phase of this shipping matter, we ought to do it in a separate measure and ought to consider it carefully, because I can see there may be many complications we ought to take care of, such as those which necessarily must arise during war and from conditions that do not affect the ordinary merchant ships."

** Congressional Record, Vol. 59, Part 2, page 1751 (italics ours):

"Mr. Bankhead. It seems to me, taking into consideration the fact that section 2 only relates to one specific phase of the general purpose in view, the gentlemen's proposition is not good that this bill relates to only one class of merchant vessels.

Mr. Walsh. The gentleman stopped too soon in the reading of the title.

Mr. Bankhead. In what particular?

Mr. Walsh. He said, 'authorizing suits against the United States in admiralty.' It also says:

Suits for salvage services, and providing for the release of merchant vessels belonging to the United States from arrest and attachment in foreign jurisdictions, and for other purposes.

Now, it is not limited to just suits in admiralty. It declares immunity and also relates to stipulations as to the release of

On February 23, 1920 the Managers of the Committee of Conference submitted a Conference Report on S. 3076. which set forth the bill in the form in which it was finally enacted. In report, No. 669, 66th Congress, 2nd Session, the Managers on the part of the House made a statement which contained among other things, the following:

> "1. Section 1 of the House amendment has been rewritten. As amended, it eliminates the provision declaring all vessels of the United States to be public vessels, and excludes the Panama Railway Co. from the operation of the bill.
>
> 2. In section 2 the words 'or intended to be employed in the carriage of cargoes or of passengers for hire' have been stricken out, and the words 'as a merchant vessel or as (sic) a tugboat operated by such corporation.'* The effect of this change is to exclude from the scope of the bill certain public vessels not employed as merchant vessels, but that occasionally carry persons and property for hire, and to make certain that tugboats employed as auxiliaries to the merchant fleet are made subject to the proposed act."

Thus was shown the importance of the carriage of persons or property for hire as determining the character of a vessel and the scope and jurisdiction of the District Courts under the proposed bill.

The deliberations in Congress show that the Congressional intent never included any category or classi-

---

various public vessels from arrest. *But throughout the entire bill, Mr. Chairman, from first line to the last, the clear intent and purpose is to restrict it to merchant vessels; vessels employed in carrying cargo for hire, or intended to be so employed. There is nothing in here that can be construed to include battleships, submarines, Navy tugs, or any other of the vast number of vessels afloat which are owned by the Government.*"

* The words "substituted therefor" or words to that effect, were apparently omitted here.

fication other than public vessels of the United States on one hand, and all vessels employed as merchant vessels on the other. It is clear that the term "public vessels of the United States" referrs to "battleships, submarines, Navy tugs, or any other of the vast number of vessels afloat which are owned by the Government"; and that the words "employed as a merchant vessel" referred to "vessels employed in carrying cargo for hire, or intended to be so employed." *Cong. Rec. Vol. 59, Part 2*, page 1751, quoted *ante*, p. 21, n. Compare *The Nishmaha* (D. Ore. 1920), 263 Fed. 959, as to the meaning of the similar words in Section 9 of the Shipping Act, 1916.

There is no indication whatever of Congressional intent that a cargo vessel usually employed in the carriage of cargo for hire would lose her character as a merchant vessel if she should be engaged in the carriage of Government cargo for hire. Her merchant character is fixed by her employment in the earning of money for her owner by the carriage of cargo for hire. There is no indication of Congressional intent that the *nature* of the cargo which she carries for hire would make the slightest difference in her status or character for the purposes of the Act.

After all, the cargo on board the *Portmar* was Government-owned, and it was vital in the public interest that such cargo reach its destination without interference. If the *Portmar* was subject to arrest while so engaged, the carriage of that cargo might have been seriously interrupted. It was in such a situation, among others, that the Suits in Admiralty Act was designed to confer immunity of the vessel from arrest. The vessel was being operated "for the United States", being committed to the carriage of Government goods and stores, and it was just as important in the public interest that the *Portmar* should be immune from arrest while so engaged, as that her cargo

should be immune from arrest, as it clearly was. What good would immunity of the cargo accomplish if the vessel itself could be tied up by process *in rem?*

The test under the decisions of this Court already cited is whether at the material time the vessel is privately owned and operated in the carriage of passengers or cargo for hire; not the kind of passengers or cargo which the vessel may be carrying. There is no middle ground between the categories established by the decisions of this Court. A vessel privately owned, privately manned and operated is "employed as a merchant vessel", no matter what kind of persons or cargo she may carry so long as she carries such persons or cargo *for hire.*

It is clearly within the scope of the Act, and of the intent of Congress in the passage of the Act, that a privately owned vessel while engaged in the business of carrying Government cargo for hire is "employed as a merchant vessel" and as such should be immune from arrest.

It follows that the District Court had jurisdiction under Sections 1 and 2 of the Suits in Admiralty Act, 1920, of the claim against the United States, here presented. *Matson Navigation Co.* v. *United States* (1932), 284 U. S. 352.

SECOND POINT.

IF THE *Portmar* WAS NOT A CONSTRUCTIVE TOTAL LOSS UNDER THE WAR RISK INSURANCE POLICIES, THE GOVERNMENT IS LIABLE TO PETITIONER FOR CHARTER HIRE TO THE DATE OF REQUISITION OF TITLE TO THE VESSEL.

(a) *The net amount of the charter hire claim.*

If the *Portmar* was not a total loss, either actual or constructive, the United States is liable for charter hire in

addition to victualing charges allowed by the District Court. R. 777.

The provisions of Articles 1.02, 2.03 and 2.04 of the charter, which govern the rate and payment of the charter hire, will be found in Appendix II.

The amount of charter hire for the period February 19, 1942 to noon on November 17, 1942, when title to the damaged vessel was requisitioned, was established in the evidence at $360,026.71. R. 151, 742.

From that sum there must be deducted operating expenses saved by petitioner, because the vessel could not be operated, in the sum of $92,220. R. 25, 223, 742.

The net charter hire claim, therefore, amounts to $267,806.71.

(b) *Cessation of hire on constructive total loss under the war risk insurance.*

The reference to constructive total loss in Article 2.03 of the charter contemplated a constructive total loss under the war risk insurance policies specified in and the form of which was prescribed by Article 2.17 of the charter.

If there be any contention that the Government's liability for charter hire terminated on any kind of constructive total loss other than that recoverable under the war risk insurance, such contention is contrary to the provisions of the documents. Article 2.17 of the charter prescribed the form of the war risk insurance. Appendix II; R. 35. Article 1.03 fixed the amount of the valuation to be insured. Appendix II; R. 20. Said insurance as prescribed was taken out by petitioner and approved by the Maritime Commission. R. 715.

The term "constructive total loss" is peculiar to marine insurance. *Assicurazioni Generali* v. *Bessie Morris Co.*

[1892], 2 Q. B. 652. The expression has no other meaning than that which is given to it by the law of marine insurance. It must be related to an existing policy. *Manchester Ship Canal Co.* v. *Horlock* [1914], 2 Ch. 199; *Roura and Forgas* v. *Townend* [1919], 1 K. B. 189; *Robertson* v. *Petros Nomikos Ltd.* [1939], A. C. 371.

It is plain that under the terms of Article 2.03 of the charter the Government was obliged to pay hire for the use of the vessel at the rate stipulated in Article 1.02, beginning with the time of her delivery, and continuing until the time of her redelivery in like good order and condition, ordinary wear and tear excepted, to the owner at the agreed port of redelivery as specified in Article 1.04, *unless*, prior to such redelivery, "the vessel shall be lost . . . or in the case of a constructive total loss . . .", in either of which events the obligation to pay hire terminated.

Hence, since the *Portmar* was never "lost", in the sense of actual total loss, the sole question to be determined is the meaning of the words "in the case of a constructive total loss" as used in Article 2.03.

The petitioner, believing that the vessel was a "constructive total loss" tendered abandonment to the underwriters, but they declined to accept the tender. Hence, until that issue between the owner and the underwriters is decided, the liability of the Government to continue paying hire under the provisions of Article 2.03 cannot be determined, for the Government's liability to pay hire terminated only if the vessel became a "constructive total loss" within the meaning of the war risk insurance policies.

If this Court determines, contrary to the decision of the District Court and our contentions in Case No. 303, pending before this Court with the present case, that the *Portmar* did not become a "constructive total loss" within the meaning of the war risk insurance policies, then the Gov-

ernment's obligation under Article 2.03 to pay hire continued until the date of requisition of title to the vessel.

The charter and the insurance herein were closely related. The charter contemplated and specified the precise form and valuation of the war risk insurance, and provided that the Charterer should pay for it.

The present policies contained the following clauses:

> "No recovery for a Constructive Total Loss shall be had hereunder unless the expense of recovering and repairing the Vessel shall exceed the insured value.
>
> "In ascertaining whether the Vessel is a Constructive Total Loss the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the Vessel or wreck shall be taken into account.".

Policies, Libelant's Exhibits 6, 7, 8. R. 70-71, 712.

The District Court herein held that by the first paragraph of the above quoted clause, the policies adopted the English rule. R. 752.

To say that hire should cease on constructive total loss under any rule not contemplated by the insurance specified in the charter, and irrespective of the war risk insurance so prominently considered in the charter provisions, distorts the plain intent and purport of the arrangement.

In short; the test of constructive total loss was intended to be, and should be held to be, the same in both documents.

(c) *The charter provisions for payment of hire.*

It is a paramount fact that by the terms of the charter the United States agreed to pay the charter hire until redelivery of the vessel, and during loss of time caused by,

or during repairs due to, breakdown, stranding or other accident or damage to the vessel caused by war or warlike acts. See the provisions of Articles 2.03 and 2.04 of the charter set forth in Appendix II.

Explicit provisions for the payment of hire override general charter exceptions. *The Clyde Commercial Co. v. West India S. S. Co.* (*The Santona*) (2 Cir. 1909), 169 Fed. 275.

The present charter makes sure of that principle by the concluding words of Article 2.16, the general exception clause, which relieved either party of liability for, among other things, "restraint of princes";

> "* * * No exemption afforded to the Charterer under this Article shall diminish its obligations for hire under the other provisions of this Charter."

Petitioner's claim as to charter hire was based on the alternative that it might be held that the damages sustained by the *Portmar* did not constitute a total loss, either actual or constructive under the war risk insurance, but only a partial loss. On that basis, if the loss were only partial, then the foregoing charter provisions for payment of hire until the completion of repairs before redelivery require full payment of charter hire up to the date of the requisition of title.

The Government's requisition of title to the vessel on November 17, 1942 put an end to further performance of the charter by the *Portmar* and to further payment of hire, because from that date forward petitioner did not own the vessel as contemplated by the charter. But if, contrary to petitioner's contentions and the findings of the District Court in Case No. 303, it should be held that the *Portmar* was not a constructive total loss within the terms of the war risk insurance policies, the liability of the Government

is clear as to payment of the charter hire up to the time of the requisition of title.

(d) *Petitioner performed all its obligations under the charter.*

The District Court held that "libelant duly performed all the terms and conditions of the charter to be performed on its part". R. 756.

There is no room for criticism of petitioner for failing to operate the vessel after the enemy attacks of February 19, 1942, because petitioner was prevented by supervening circumstances from continuing the operation of the vessel. The general exceptions contained in Article 2.16 of the Charter, "act of war, act of public enemies * * * arrest and restraint of princes" afford petitioner a complete defense to any contention of non-performance or breach of charter.

There was a suggestion below, that petitioner "abandoned the vessel".

But there is a sharp distinction between a tender of abandonment to the underwriters of the interest of the assured in the vessel, and actually to "abandon" the vessel itself. The former is required of the assured as a condition for recovery of a constructive total loss. *Knight* v. *Faith* [1850], 15 Q. B. 649. The latter means "give up for lost". See *Arnould on Marine Insurance,* V. 2, Section 1091-(a), where the author discussed the distinction between the term "abandon" as found in Sections 60 and 61 of the British Marine Insurance Act; also *Court Line, Ltd.* v. *Rex,* (1943), 2 All. E. R. 357 at 362, 365; and *Michelson,* R. 358, 422-423, 445, 447.

After the enemy attack, petitioner did all that it could to protect the vessel and its interest in the vessel, and con-

tinued to do so after the underwriters rejected the tender of abandonment.

The *Portmar* was never physically "abandoned" by petitioner. On February 19, 1942 the Master personally lowered the port anchor to hold the vessel in position on the rise of the tide in order to control the entry of water so that the vessel would not turn over and the boilers explode. R. 725-726. During the following days the Master remained on or near the *Portmar* and returned to the ship whenever he could. R. 726-729. On February 21st, the Master personally lowered the starboard anchor in order to keep the vessel from going adrift if a heavy storm should come up. R. 727. He tried by every possible means to get in touch with his owner and obtain their instructions with respect to the vessel. R. 727, 728, 730. When he left the vessel on March 3, 1942, he intended to return. R. 353, 358. During the interval March 3rd to March 10th, 1942, the Master and crew of the *Portmar* were prevented from returning to the vessel because they were confined under guard in the military camp. R. 729. When the crew was repatriated from Melbourne, the Master remained in Australia to look after the owner's interest in the vessel and employed counsel to represent him and protect the interests of the vessel and her owner. R. 733. The Master endeavored by all possible means to return to Darwin and failing in this to get information as to the situation of the *Portmar* and what was being done with her. R. 733. When the Master learned that the *Portmar* was being towed to Brisbane, the Master went from Melbourne to meet her, and arrived at Brisbane on July 29, 1942. R. 737. See also cables and letters R. 607-621.

The vessel was then in complete possession and control of the Army, R. 211, 737. But the facts show that petitioner

never "abandoned" the vessel in the sense that it gave her up. On the contrary, petitioner, through the Master, made every attempt possible under the circumstances, but was prevented from accomplishing the necessary repairs to restore the vessel to classification and from continuing the operation of the vessel under the charter by forces directly within the exceptions set forth in Article 2.16 of the charter, especially "act of public enemies" and "restraint of princes".

The uncontroverted testimony of Col. T. G. Plant, Chief of Water Transportation in the Southwest Pacific Area, and of Major Haggett shows that the Army took possession of the *Portmar* after the loss, to patch her up and use her as an expendable vessel for military purposes before the actual Government requisition of title that occurred on November 17, 1942. R. 187-188, 195-196, 211, 737. But on the facts found by the District Court below, it cannot properly be said that petitioner "abandoned" the *Portmar* nor performance of the charter.

(e) *The charter was not frustrated, even though the vessel was a constructive total loss.*

There is no doubt that when the Government on November 17, 1942, pursuant to Section 902 of the Merchant Marine Act, 1936, as amended, exercised its sovereign war power to requisition title to the *Portmar* among other vessels (R. 624-625) the obligation to pay hire ceased. It matters little whether that obligation terminated by "frustration", or by "destruction of the subject matter" or on the simple principle that petitioner was not entitled to receive hire for a vessel it no longer owned. But the Government would extend the "frustration" of the charter to the date of the disaster, even though the *Portmar* was not a constructive total loss under the war risk insurance, in

order to avoid liability for hire between the disaster and the requisition of title.

Articles 2.03 and 2.04 provided for continuation of payment of charter hire during any period in which the vessel might be out of service by reason of damage due to war risk. The charter provided for cessation of hire only in the event of constructive total loss under the war risk insurance. In the face of these explicit provisions there is not any basis for the suggestion that the damage to vessel "frustrated" the charter because there is no frustration when the charter provisions cover the contingency.

The cases cited by the Court of Appeals below turned upon the happening of supervening events, *not provided for in the contract.* The doctrine of frustration is based on a condition implied in law. It operates only where there is no contract provision for the contingency. *Texas Co.* v. *Hogarth Shipping Co.*, (1921) 256 U. S. 619, 630. When the contract makes provision for the very event, no condition can be implied which would be inconsistent with the contract provision. *F. A. Tamplin S. S. Co. Ltd.* v. *Anglo-Mexican Petroleum Products Co. Ltd.*, [1916] 2 A. C. 397; *Larrinaga & Co. Ltd.* v. *Societe Franco-Americaine, etc.* (H. L. 1923), 39 T. L. R. 316, 320; *Banck* v. *Bromley & Son* (K. B. Div. 1920), 37 T. L. R. 71.

It is settled, and the Court below accepted the principle, that the "putative frustration" must be decided by the situation as it appears at the time of the interruption. R. 800; *Bank Line, Ltd.* v. *Arthur Capel & Co.* [1919], A. C. 435, by Lord Sumner at p. 454; *The Claveresk* (2 Cir. 1920), 264 Fed. 276, 282-283; *Borup* v. *Western Operating Corporation* (2 Cir. 1942), 130 F. 2d 381, 386.

Under that precept, no frustration of the charter occurred as contended by the Government below, before the requisition of title to the vessel on November 17, 1942.

Instead of applying that principle, the Court of Appeals departed from its own statement of the rule, and used hindsight of the events which occurred between January 5, 1942 and November 17, 1942 when the United States requisitioned title to the *Portmar*, to support a holding that as of January 5, 1942, although neither of the parties to the contract thought so, their agreement was at an end.*

There is not any evidence of any orders with respect to the *Portmar* on January 5, 1942 or at any time before the loss of February 19, 1942, to the effect that the *Portmar* would not be allowed within a reasonable time, to complete her round voyage. The facts are to the contrary. The passages from port to port in Australia were a distribution of the outward cargo according to the needs of the Army, the shipper of the cargo. R. 522, 525-529. That was no different from what the *Portmar* would have done in the Philippines if the war had not occurred and if she had gone to the Philippine Islands in accordance with the charter.

The facts do not show such urgent military need for the *Portmar* as the Court of Appeals has found, relying solely on the testimony of Colonel Plant, R. 795, at any time before the loss on February 19, 1942. Colonel Plant did not arrive in Australia until the end of March, 1942. R. 183. The military situation and emergency of which he had actual knowledge arose from the circumstances which existed after his arrival in Melbourne. R. 183-5. The fact that on February 4, 1942 the *Portmar* was ordered from Port Darwin to Wyndham, R. 293, with only 2000 drums of gasoline, and returned from Wyndham to Darwin empty of any cargo,

* It may also be noted that the Court of Appeals below held that a frustration of the voyage occurred at a point not pleaded by the underwriters in their answer, R. 78-84, and not included in the declaration of their proctors when questioned by the District Court. R. 113.

R. 721, hardly indicates any such critical military need for the use of the vessel *at that time,* as the Court of Appeals below has found from Colonel Plant's testimony as to events which occurred much later.

The sailing to the port of Koepang, Timor, was no more than a temporary incident, she being then free of her cargo. For all that appeared, there was to be only a round trip from Darwin across the Timor Sea to Timor and return. The Island of Timor was then in the hands of the Allies of the United States. Japanese troops did not land on Timor until March 1, 1942. R. 722. When the *Portmar* returned to Darwin from that expedition on February 18th she was ordered to berth in her turn and discharge the artillery and troops which were then on board. R. 723. The Timor expedition was ended. There were no further orders whatever with respect to the *Portmar* except, as already seen, that she was fixed by the U. S. Maritime Commission for the return leg of the round voyage from New Caledonia to Philadelphia with a cargo of chrome ore. R. 142-143, 720, 796-797.

The possibility of damage to the vessel while navigating under military controls was anticipated and provided for in Article 2.04 of the charter.

The possibility of orders to the vessel by the government of any nation or its representative was clearly anticipated and provided for by Article 2.27 of the charter.

Apart from the provisions of the contract and the authorities above cited, the conduct of the parties themselves was directly contrary to the finding of the Court of Appeals that a frustration of the voyage occurred on January 5, 1942, or that a frustration of the voyage occurred at any time before the loss occurred on February 19, 1942.

It must be remembered that the voyage in question was a round voyage. On January 17, 1942 petitioner was

informed that U. S. Lines was to be the homeward agent of the U. S. Maritime Commission for a cargo of chrome ore to be loaded on the *Portmar* at New Caledonia for Philadelphia. R. 142-143.

Petitioner's and charterer's intention to complete the round voyage never changed before word was received of the loss and the impossibility of salvage. R. 157.

On February 13, 1942 the *Portmar* was temporarily impressed into the service of the United States by requisition of use when the United States, as sovereign, ordered the *Portmar* to load the artillery detachment, guns and equipment, and on February 14, 1942 when she was ordered, in convoy conference on board *U. S. S. Houston*, to sail in convoy toward the Island of Timor. *United States* v. *Russell* (1871), 13 Wall. (U. S.) 623, 627; *Kimball* v. *U. S.* (1869), 5 Ct. Cl. 252; *American Mail Line Ltd.* v. *U. S.* (1944), 101 Ct. Cl. 377.

Notwithstanding that the vessel was temporarily impressed into the public service by the United States as sovereign, the Master's action in following such government orders was not a deviation, breach of orders or neglect of duty because of the specific provisions of Articles 2.15 and 2.27 of the charter; and the obligation to pay the hire under Article 2.03 of the charter continued because of the provisions of Articles 2.04-(b) and 2.27.

The United States continued payment of the charter hire and has paid the hire up to February 19, 1942, the date on which the vessel became a constructive total loss, in accordance with the provisions of Articles 2.03, 2.04 and 2.27 of the charter. *Charter*, R. 22-24, *Findings of Fact*, R. 742.*

---

* On June 15, 1944, the hire, theretofore paid to March 1, 1942, was adjusted to February 19, 1942 by a credit on hire due to petitioner on another vessel. *Computation of Hire*, Exhibit 24 (separate volume submitted).

The record completely demonstrates that both parties intended, until the constructive total loss of the vessel, to complete the "round voyage."

It is, to say the least, unprecedented, as conceded by the Court of Appeals (R. 798) that the performance of a contract should be held frustrated, where the parties to that contract thought it was in effect and were continuing with performance so far as government restraint permitted. The Court has thus imposed upon the parties to the charter a decision which they did not make at the time.

To the contrary, in *Bank Line, Ltd.* v. *Arthur Capel & Co.* [1919] A. C. 435, at page 460, Lord Sumner, concluding his opinion, stated the exact reverse: "* * * Both thought its result was to terminate their contractual relation by the middle of June and, as they must have known much more about it than I do, there is no reason why I should not think so too. * * *"

Accordingly, the facts do not show any frustration of the charter prior to the requisition of title, notwithstanding the damages sustained in the enemy attacks. The Government should be held liable for the Charter hire as claimed, if this Court should decide that the *Portmar* was not an actual or constructive total loss under the war risk insurance.

THIRD POINT.

IF THE WAR RISK INSURANCE WAS VITIATED OR TERMINATED BEFORE THE LOSS, OR IF PETITIONER IS LIABLE TO UNDERWRITERS FOR AN ADDITIONAL PREMIUM BY REASON OF WHAT WAS DONE BY THE *Portmar* UNDER SOVEREIGN ORDERS OF THE UNITED STATES OR ITS REPRESENTATIVES, THE UNITED STATES IS LIABLE BY VIRTUE OF ARTICLE 2.17 OF THE CHARTER TO INDEMNIFY PETITIONER AGAINST ANY AMOUNT THUS NOT RECOVERABLE FROM THE WAR RISK UNDERWRITERS OR FOR ANY SUCH ADDITIONAL PREMIUM.

(a) *If the war risk insurance terminated before the loss.*

If this Court affirms the decision of the Court of Appeals below in No. 303 that the underwriters were discharged from liability and that the war risk insurance terminated at Brisbane on January 5, 1942, by reason of military control of the vessel, then the Government should be held bound to indemnify petitioner as to any loss which otherwise would have been covered by said war risk insurance.

The provisions of Article 2.17 of the Charter, set forth in Appendix II, declare a clear intent that the vessel was to be protected by the contemplated war risk insurance throughout the voyage. The last paragraph of Article 2.17 provided as follows:

> "The Vessel shall not be required to sail on any voyage until the insurance contemplated by this Article has been placed by the Owner or provided or assumed by the Charterer, as the case may be, provided, however, that written or telegraphic notice of assumption by the Charterer shall be sufficient."

The provisions of Article 2.27 provided that if the vessel followed sovereign orders, any such departure from the charter voyage would not constitute a deviation.

It follows that if the charterer, even as a sovereign, by specific orders to this particular ship, directed the vessel on a voyage or passage which terminated the liability of the underwriters under the war risk insurance, the Government is obliged, by reason of breach of the undertaking stated in the last paragraph of Article 2.17, to indemnify petitioner to the extent of any loss which would otherwise have been covered by such insurance.

The Government contended below and may argue here, that it is not liable for any such indemnity because its orders to the *Portmar* were given in its sovereign capacity, and for such a contention the Government cited below the cases of *Horowitz* v. *United States* (1925), 267 U. S. 458, and *Froemming Bros. Inc.* v. *United States* (1947), 108 Ct. Cl. 193.

This startling proposition arises from a misunderstanding of the *Horowitz* and *Froemming* cases, which hold only that the Government is not liable in contract for losses sustained by a contractor due to *general sovereign acts affecting all parties similarly situated*, and where the contract did not contain any explicit provision that such acts should not be done by the United States.

In *Horowitz* v. *United States, supra*, the plaintiff contracted to buy silk from the Ordnance Department. Delivery of the silk to the plaintiff was delayed because the Government through the U. S. Railroad Administration, placed an embargo on *all* shipments of silk by freight. Thereafter the Government shipped the silk to the plaintiff and the plaintiff resold on a declining market at a loss, for which the suit was brought. This Court said, 267 U. S. at page 461: (italics ours)

"It has long been held by the Court of Claims that the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from *its public and general* acts as a sovereign. *Deming* v. *United States*, 1 Ct. Cls. 190, 191; *Jones* v. *United States*, 1 Ct. Cls. 383, 384; *Wilson* v. *United States*, 11 Ct. Cls. 513, 520. In the *Jones* case, *supra*, the court said: 'The two characters which the government possesses as a contractor and as a sovereign cannot be thus fused; nor can the United States while sued in the one character be made liable in damages for their acts done in the other. Whatever acts the government may do, be they legislative or executive, *so long as they be public and general*, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons. . . . In this court the United States appear simply as contractors; and they are to be held liable only within the same limits that any other defendant would be in any other court. *Though their sovereign acts performed for the general good may work injury to some private contractors*, such parties gain nothing by having the United States as their defendants.'"

In *Froemming* v. *United States*, *supra*, the plaintiff sued the Government for losses incurred under the performance of its work under a Government contract because the Government did not do certain preparatory work in time to enable the plaintiff to proceed promptly. The Government admitted its failure to do the preparatory work but took the position that after the attack on Pearl Harbor and the threatened danger to the Panama Canal, the delay was due to directives of the military authorities in Washington which diverted labor and material to other and more immediately important work. The rule of the *Horowitz*

case was invoked and the Government's position was sustained. In the decision, 108 Ct. Cl. at page 213 the Court said: (italics ours)

> "* * * But whatever was done was done by the military command and it was the responsible agent of the sovereign at the time. *There is no indication that any discrimination was purposely practiced against the plaintiff.* * * *"

In neither the *Horowitz* case, nor the *Froemming* case was there any provision in the contract that the United States would not do the very act complained of; and the acts there involved were *general sovereign acts,* affecting not only the contractor, but all persons within the purview of the Government orders or regulations.

Here the sovereign acts were specific as to the *Portmar* alone, and were a breach of the express undertaking in the last paragraph of Article 2.17 of the charter.

Under such circumstances the Government is as liable for breach of contract as any private citizen would be.

> *United States* v. *Bostwick* (1876), 94 U. S. 53, 69;
> *United States* v. *Peck* (and cross action) (1880), 102 U. S. 64;
> *Sunswick Corp.* v. *U. S.* (1948), 109 Ct. Cl. 772; 75 F. Supp. 221;
> *Houston Construction Company* v. *U. S.* (1903), 38 Ct. Cl. 724.

In *Sunswick Corp.* v. *U. S., supra,* the claim was for increased labor costs incurred in the performance of a lump sum contract with the United States. The act of the Government which increased the costs was a directive order of the Federal Wage Adjustment Board which specifically directed the plaintiff to pay an increased wage

rate retroactively to the beginning of the project. On that ground the Court of Claims distinguished the *Horowitz* case and other cases cited therein, and held the Government liable.

If any diversion of the *Portmar* from the insured voyage had the effect of terminating the war risk insurance, petitioner did not know what was going on, and thus had not any opportunity to restore or to replace the insurance. R. 145-146.

It follows that if this Court affirms the decision of the Court of Appeals in No. 303 that the underwriter's liability under the war risk insurance policies came to an end because the *Portmar's* voyage was frustrated by military control in Australia, then the United States violated its undertaking set forth in the last paragraph of Article 2.17 of the charter, in sending the *Portmar* on new voyages without any war risk insurance whatever, and should be held liable to indemnify petitioner accordingly, for any amount, with interest, which petitioner would have been entitled to recover from the underwriters if the war risk insurance had remained in effect. *Talbot* v. *U. S.* (1871), 7 Ct. Cl. 417.

(b) *If there was a deviation which entitled the war risk underwriters to additional premium.*

Article 2.17 of the charter provided that the charterer should pay for insurance on the vessel in the amount specified in Article 1.03, under full form of American Institute of Marine Underwriters' war risk policies; and that the vessel should not be required to sail on any voyage until the insurance contemplated by Article 2.17 had been placed by the owner. *Post*, Appendix II.

In Article 2.17 of the Charter the United States assumed full liability to pay all premiums due under the war risk

insurance contemplated in that Article of the charter. It has been conceded that the war risk insurance policies petitioner's Exhibits 6, 7 and 8, were such insurance. R. 261, 262-263. See also *Letter, February 20, 1942,* Exhibit 10, R. 602.

If, contrary to the District Court's decision, and contrary to *Rickards* v. *Forestal etc. Co. Ltd.*, [1942] A. C. 50, this Court should hold that petitioner's losses with respect to the *Portmar* were, by reason of deviation, covered by the war risk insurance only by virtue of the "Held Covered" clause, and that the war risk underwriters are entitled to a set-off to the extent of an additional premium thereunder, or otherwise,* then by virtue of the provisions of the last paragraph of Article 2.17 of the Charter, the United States is liable to indemnify petitioner against any loss by reason of such additional premium, or to the extent of reduction of the proceeds of such insurance by virtue of such a set-off.

If any "deviation" or "change of voyage" occurred as described in the "Held Covered" clause of the policies (R. 70-71, 714), then any such passage was a voyage in itself and was directly covered by the warranty of the last paragraph of Article 2.17 of the charter, quoted *ante,* p. 37.

Thus by direct contract to pay the premium on the war risk insurance contemplated by Article 2.17 of the charter, and by warranty that the *Portmar* would not be required to sail on any voyage without such insurance, the United States is obligated to make good to petitioner the amount of any additional premium allowed by set-off to the war risk underwriters, or the amount of any reduction of the proceeds of such war risk insurance by virtue of such set-off.

---

* Any additional premium so allowed should not exceed 6½% of the amount insured, in accordance with the rate published by the American Syndicate, in effect February 15, 1942. R. 606; Exhibit 54, in exhibit volume separately submitted.

FOURTH POINT.

THE UNITED STATES IS LIABLE, PURSUANT TO THE PROVISIONS OF ARTICLE 2.11 OF THE CHARTER, TO INDEMNIFY PETITIONER AGAINST ANY LOSS OR LIABILITY ARISING FROM COMPLIANCE WITH ORDERS GIVEN BY THE UNITED STATES OR ITS REPRESENTATIVES, EVEN THOUGH SUCH ORDERS WERE GIVEN AS A SOVEREIGN.

The Government naval orders which transferred the *Portmar* to the direction of the British and Australian naval authorities (R. 279), and which later put troops and artillery on board the *Portmar* and sent her out toward Timor, in convoy of the Cruiser *Houston* (R. 722-723, 744-745) were those of the United States as sovereign rather than as charterer. R. 716, 718, 744-745, 746-747. In the latter capacity the United States had no power or authority to give any such orders.

Under earlier forms of charter the usual indemnity against consequences of complying with charterer's orders would not cover the present facts. *Larrinaga S. S. Co. Ltd. v. King* [1945], A. C. 246.

But here the last paragraph of Article 2.11 of the charter (see Appendix H, R. 28) contained a much broader form of indemnity contract, as follows: (italics ours)

> "The Charterer shall indemnify and hold harmless the owner, the Master and the Vessel from all consequences and liabilities whatsoever arising from compliance with any orders or directions of the Charterer or its agents, *given pursuant to this Article or any other Article of this Charter.*"

The words "or any other article of this charter" relate directly to the orders which the United States, in its sov-

ereign capacity, gave to the Master as forecast in Article 2.27.

The undertaking of indemnity in the last paragraph of Article 2.11 of the Charter does not qualify the nature of the orders contemplated. If it was intended to limit the indemnity to orders of the United States in its capacity of charterer, it would have been simple enough to say so. But no such limitation was made. The provision specifically enlarges the usual undertaking. There is no ambiguity. The provision should be enforced according to its plain terms. *Calderon* v. *Atlas S. S. Co.* (1898) 170 U. S. 272; *Adams, et al.* v. *Mackenzie* (1863), 13 C. B. (N. S.) 442.

It follows that when the United States, as sovereign, gave orders to the vessel, the Master not only had liberty to, but was bound to, comply (*Rickards* v. *Forestal etc.* [1942], A. C. 50, 80) without subjecting the carrier to liability for deviation; and the United States was bound by its express contract to indemnify petitioner against any loss by reason of such compliance. *Sunswick Corp.* v. *U. S.* (1948), 109 Ct. Cl. 772; 75 F. Supp. 221.

No contention is made here for indemnity with respect to general sovereign orders applicable to all American vessels alike. We are here concerned with specific military orders to the vessel given as sovereign, affecting the *Portmar* alone, not the general orders of a sovereign affecting all parties similarly situated, and not within the rule of the *Horowitz* and *Froemming* cases, *ante*, pp. 38-40.

In view of the broad terms of the indemnity contract contained in the last paragraph of Article 2.11 of the charter, if this Court should affirm the Court of Appeals (in No. 303) and hold that any loss sustained by petitioner with respect to the *Portmar* is not recoverable from the war risk underwriters, or is subject to set-off in the amount of any

additional premium allowed under the "Held Covered" clause, then the United States should be held liable to indemnify petitioner for any amount, whether of principal or interest, which petitioner would have been entitled to recover from said war risk underwriters but for compliance with such orders, or any other loss or liability sustained by reason of compliance with such orders.

Conclusion

This Court should hold that the District Court had jurisdiction of the libel herein under Sections 1 and 2 of the Suits in Admiralty Act, March 9, 1920, and the decision of the Court of Appeals herein should be reversed.

If this Court should hold in Case No. 303, contrary to the decision of the District Court and our contentions therein, that the damages sustained by the *Portmar* did not constitute a constructive total loss under the war risk insurance policies, then the mandate of this Court should issue directing the District Court herein to enter decree in favor of petitioner against the United States for charter hire less operating expenses saved, together with victualling charges as allowed below, in the total sum of $268,045.21 with interest according to law.

If this Court should hold in Case No. 303, contrary to the decision of the District Court and our contentions therein, that the war risk insurance of the *Portmar* was terminated or vitiated before the Japanese attacks on the *Portmar*, by reason of compliance of orders given to the *Portmar* by the United States or its representatives, or that the war risk underwriters are entitled to a set-off by reason of additional premium under the "Held Covered" Clause of the war risk insurance policies, then by virtue of the provisions of Articles 2.11 and 2.17 of the *Portmar*

charter, this Court should direct that the District Court enter decree herein in favor of petitioner against the United States for indemnity as to any amount, whether of principal or interest, for which petitioner is thus denied recovery against said war risk underwriters.

Dated December 12, 1952.

Respectfully submitted,

EDWIN S. MURPHY,
Counsel for Petitioner,
120 Broadway,
New York 5, N. Y.

IRA A. CAMPBELL,
HELEN C. CUNNINGHAM,
Of Counsel.

APPENDIX I.

Pertinent provisions of the Suits in Admiralty Act, March 9, 1920, 41 Stat. 525, Secs. 1 and 2 (46 U. S. C. 741-742):

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That no vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided,* That this Act shall not apply to the Panama Railroad Company.

SEC. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. * * *"

Pertinent provisions of the Public Vessels Act, 1925, March 3, 1925, 43 Stat. 112, Section 1 (46 U.S.C. 781):

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That a libel *in personam* in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided,* That the cause of action arose after the 6th day of April, 1920."

APPENDIX II.

Pertinent Clauses of the time charter of SS. Portmar, Exhibit A, Attached to Libel, R. 18-38.

Contract MCc-1915

TIME CHARTER.

CHARTER PARTY made as of November 21, 1941, between CALMAR STEAMSHIP CORPORATION, a Delaware corporation, OWNER of the good steel steamship *Portmar* (herein called the "Vessel") with hull, machinery and equipment in a thoroughly efficient state, of about 428,116 cubic feet bale capacity and about 8600 tons (of 2240 pounds) deadweight capacity for cargo, bunkers, fresh water and stores on a mean draft of 24 feet and 0 inches on Lloyds Summer freeboard, inclusive of permanent bunkers (including deep tanks used for bunkers), which are of the capacity of about 11,992 barrels of fuel oil, and capable, when fully laden, of maintaining under good weather conditions a speed of about 9½ knots on a consumption of about 164 barrels best grade fuel oil (Bunker "C" or equivalent) per 24 hours, with gear for all derricks capable of handling lifts up to three tons, the speed and consumption being believed by the Owner to be correct, but not guaranteed, and the UNITED STATES MARITIME COMMISSION, CHARTERER:

WITNESSETH:

WHEREAS:

I. The Charterer has determined, pursuant to the provisions of an Act of Congress approved June 6, 1941 (Public Law 101—77th Congress), that vessels in addition to those otherwise available are necessary for transportation of foreign commerce of the United States, or of commodities essential to the national defense;

II. The Charterer deems the terms and conditions hereof and the period of this Charter and the restrictions herein

contained to be necessary or desirable for the protection of the public interest and the rate of hire herein provided to be fair and reasonable.

NOW, THEREFORE, the Owner and Charterer agree:

PART I.

ARTICLE 1.01. The Owner agrees to let, and the Charterer agrees to hire the Vessel, from time of delivery, for trading for one round voyage from United States Pacific port or ports to a port or ports in the Philippine Islands, returning to U. S. North Atlantic port or ports.

ARTICLE 1.02. The rate of hire payable as provided in ARTICLE 2.03 shall be $4.70 per ton of the Vessel's deadweight capacity as hereinbefore stated per month or pro rata for any portion thereof. The Charterer shall also pay the Owner at the rate of $1.50 per day per person for victualling of any personnel (in addition to the Vessel's normal complement) required to be aboard the vessel by written request of the Charterer or by any other agency or department of the Government, and $1.00 per day per person for victualling any extra complement of the vessel necessitated by such personnel being aboard. * * *

* * *

ARTICLE 1.03. The valuation of the Vessel for insurance purposes as provided in ARTICLE 2.17 shall be $860,000.

* * *

PART II.

ARTICLE 2.01. The Vessel shall be placed at the disposal of the Charterer at the port of delivery at such safe ready dock, wharf or place as the Charterer may direct. Any time lost by the Vessel awaiting the availability of such dock, wharf or place shall count as time on hire. The Vessel on her delivery shall be ready to receive cargo with clean-swept holds and, as far as due diligence can make it so, tight, staunch, strong and in every way fitted for service, having water ballast, winches and power sufficient

to run all the winches at one and the same time and a Master and a full complement of officers and crew for a vessel of her tonnage, and due diligence shall be exercised by the Owner to maintain her in such state during the currency of this Charter. The Vessel shall be employed in carrying lawful merchandise, including petroleum or its products in proper containers, between safe ports or places, in lawful trades within the trading limits of this Charter, as the Charterer or its agents shall direct.

ARTICLE 2.02. The whole reach and burthen of the Vessel's holds, decks, and usual places of loading (but not more than she can reasonably stow and carry), shall be at the Charterer's disposal, reserving only space proper and sufficient in the opinion of the Master for Vessel's officers and crew, Master's cabin, tackle, apparel, furniture, provisions, fresh water, stores and fuel.

ARTICLE 2.03. The Charterer shall (except as otherwise specifically provided herein) pay hire for the use of the Vessel at the rate stipulated in ARTICLE 1.02, beginning with the time of her delivery, and continuing until the time of her redelivery in like good order and condition, ordinary wear and tear excepted, to the owner at the port of redelivery specified in ARTICLE 1.04, or if the Vessel shall be lost, until the time of her loss, if known, otherwise to the time last heard from, or in the case of a constructive total loss, to the time of the casualty resulting in such constructive total loss, except that where two or more successive casualties contribute to such loss, the time of the casualty last occurring shall be the time when hire ceases. Redelivery shall not be made until completion of repairs of any damage arising from causes specified in ARTICLE 2.04 (ii), and hire shall continue until completion of such repairs, except to the extent that loss of time is caused by failure of the Owner to exercise due diligence to have such repairs effected promptly and to prevent loss of time. * * *

ARTICLE 2.04. Payment of hire hereunder shall cease to the extent that time is lost to the Charterer:

(a) if the Vessel is prevented, in whole or in part, from working for twenty-four consecutive hours because of a deficiency of men or stores, breakdown of machinery, collision, stranding, or fire or other accident or damage to the Vessel; or * * *

Provided, however, That, except to the extent that loss of time is caused by the failure of the Owner to exercise due diligence to keep the Vessel working and to prevent loss of time, payment of hire shall not cease because of:

* * * *

(ii) the happening of any event listed in (a) above caused by the fault of the Charterer or caused or contributed to by war or warlike acts, sailing in convoy, operating (contrary to peace-time custom) without lights or pilots, navigating or mooring in (contrary to peace-time custom) unlighted, unbuoyed, or overcrowded waters, excessive usage (because of war or warlike conditions) of machinery or equipment, navigating (contrary to peace-time custom) under the direction of naval, military, Coast Guard, or other governmental authorities, or discharging alongside or into ships; or * * *

* * * *

* * * Credit shall be given to the Charterer for expenses save by the Owner during any loss of time as to which no cessation of hire is provided for.

ARTICLE 2.05. The Owner shall provide and pay for: all provisions; all galley, cabin, deck and engine room stores; fuel for cooking; wages of, and consular, shipping and discharging fees and other expenses pertaining to, the Master, Officers and Crew (except as herein otherwise provided); 25% of all fresh water used by the Vessel if a steamer, or 75% of a motorship, all water ballast; and insurance (except as herein otherwise provided) on the Vessel.

ARTICLE 2.06. The Charterer shall (except as herein otherwise provided) provide and pay for: all fuel (except for cooking) 75% of all fresh water (except water ballast) if the Vessel is a steamer, or 25% if a motorship; all port charges, pilotages, light, dock, canal and other dues, stevedoring, agencies, commissions, reasonable ballast, (except water ballast, and the cost of loading and discharging it); tug assistance and boating where incurred for the Charterer's business, and all other charges and expenses whatsoever except those which, by the terms of this Charter, are specifically made payable by the Owner. * * *

* * *

ARTICLE 2.10. The Charterer shall furnish the Master from time to time with all requisite instructions and sailing directions, in writing, * * *

ARTICLE 2.11. Subject always to the direction of the Charterer, the Master shall prosecute his voyages with the utmost dispatch and shall render all customary assistance with Ship's crew and boats; and shall use due diligence in caring for and ventilating the cargo. The Master (although appointed by the Owner) shall be under the orders and directions of the Charterer as regards employment, agency, and prosecution of the voyages; and Charterer shall load, stow, trim and discharge the cargo at its expense under the supervision of the Master, who is to sign bills of lading for cargo as presented, in conformity with Mate's or Tally Clerk's receipts. The Master, officers and crew of the Vessel in supervising loading, stowing, trimming, tallying and discharging, shall be deemed the agents of the Charterer, except in so far as such supervision pertains to the safety of the Vessel. * * *

The Charterer shall indemnify and hold harmless the Owner, the Master and the Vessel from all consequences and liabilities whatsoever arising from compliance with any orders or directions of the Charterer or its agents, given pursuant to this Article or any other Article of this Charter.

* * *

ARTICLE 2.16. The Vessel, her Master and Owner, shall not unless otherwise in this Charter expressly provided, be responsible for any loss or damage or delay or failure in performing hereunder, arising or resulting from: * * * fire, unless caused by the personal design or neglect of the Owner; * * * stranding, or peril, danger or accident of the sea or other navigable waters; * * * or from any other cause of whatsoever kind arising without the actual fault of privity of the Owner. And neither the Vessel, her master or Owner, nor the Charterer, shall unless otherwise in this Charter expressly provided, be responsible for any loss or damage or delay or failure in performing hereunder arising or resulting from: act of God, act of war; act of public enemies, * * * arrest or restraint of princes, rulers or people, * * * No exemption afforded to the Charterer under this Article shall diminish its obligations for hire under the other provisions of this Charter.

ARTICLE 2.17. The Owner may provide, and the Charterer shall pay for, or, if the Charterer shall so elect and give notice of such election to the Owner at or prior to the date of delivery of the Vessel with respect to the first voyage, or at or prior to the time when loading commences at the first port of loading with respect to any subsequent voyage during the charter period, the Charterer shall provide and pay for or assume: (i) insurance on the Vessel, which shall be made payable to the Owner, in the amount specified in Article 1.03, under full form of American Institute of Marine Underwriters' war risk policies, including malicious damage, sabotage, strikes, riots and civil commotion, valued at the amount insured * * *

The Vessel shall not be required to sail on any voyage until the insurance contemplated by this Article has been placed by the Owner or provided or assumed by the Charterer, as the case may be, provided, however, that written or telegraphic notice of assumption by the Charterer shall be sufficient.

* * * *

ARTICLE 2.21. Nothing herein stated is to be construed as a demise of the Vessel to the Charterer.

* * *

ARTICLE 2.27. The Master and the Vessel shall have liberty to comply with any orders or directions as to loading, departure, arrival, routes, ports of call, stoppages, discharge, destination, delivery or otherwise howsoever given by the government of any nation or department thereof or any person acting or purporting to act with the authority of such government or of any department thereof, or by any committee or person having, under the terms of the war risk insurance on the ship, the right to give such orders or directions, and if by reason of or in compliance with any such orders or directions anything is done or is not done, such shall not be deemed a deviation or breach of orders or neglect of duty by the Master or the Vessel; * * *